UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LONG ISLAND SOUNDKEEPER FUND, INC. and NEW YORK COASTAL FISHERMEN'S ASS'N, INC.,

Plaintiffs,

94 Civ. 0436 (RPP)

OPINION AND ORDER

-v-

NEW YORK ATHLETIC CLUB OF THE CITY OF NEW YORK,

Defendant.

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A P P E A R A N C E S

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ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiffs and Defendant cross move for summary judgment on various claims asserted by Plaintiffs in this litigation brought pursuant to the Federal Water Pollution Control Act (the "Clean Water Act" or "CWA"), 33 U.S.C. §1251 et seq., and the Federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq. For the reasons stated below, Plaintiffs' motion for partial summary judgment is granted and Defendant's motion for summary judgment is granted in part and denied in part.

Background

By a Complaint dated January 24, 1994, Plaintiffs, Long Island Soundkeeper Fund ("Soundkeeper") and New York Coastal Fishermen's Association ("Fishermen") allege violations of the Clean Water Act and RCRA by Defendant, the New York Athletic Club ("NYAC"), in the operation of a trap shooting range at its Travers Island facility on Long Island Sound ("the Range"). Plaintiffs' Complaint contains four claims for relief under RCRA, based on alleged violations of statutory and regulatory prohibitions of solid and hazardous waste disposal and two claims for relief under the CWA based on alleged violations of the statutory prohibition of discharge of pollutants from a point source into navigable waters of the United States without a National Pollution Discharge

Elimination System ("NPDES") permit and discharge of dredged and fill material into navigable waters without a permit issued by the United States Army Corps of Engineers. Plaintiffs seek declaratory and injunctive relief, remediation, civil penalties and attorney's fees.

Plaintiff Soundkeeper is a not-for-profit organization whose primary interest is to conserve and enhance the biological integrity of Long Island Sound and to protect its natural resources. Compl. ¶8. Most of Soundkeepers' members live on or near Long Island Sound and make use of the coastal region for a number of activities, including: fishing, boating, swimming, shellfishing, and birdwatching. Compl. ¶8. Plaintiff Fishermen is a not-for-profit organization whose primary purpose is to encourage the protection and rational use of New York's coastal heritage. Compl. ¶10. Defendant is a membership association organized under the not-for-profit corporation laws of the State of New York. Plaintiffs' Statement Pursuant to Local Rule 3(g) ("Pl. 3(g)") ¶3. For over sixty years in the months from November to April, Defendant has operated a trap shooting range on premises owned by it at Travers Island, Pelham Manor, New York. Pl. 3(g) ¶9. Spring launchers are used to throw clay targets out over Long Island Sound. Defendant's Statement Pursuant to Local Rule 3(g) ("Def. 3(g)") ¶11. Individuals stand on concrete platforms, facing Long Island Sound, from which they fire at the clay targets launched over the water. Pl. 3(g) ¶12. Prior to the 1994-95 trap shooting

season, lead shot was used at the NYAC range. During the 1994-95 season, NYAC switched to steel shot. Affidavit of Stephen A. Vasaka, sworn to on May 19, 1995 ("Vasaka Aff.") ¶5.

In its motion, Defendant challenges Plaintiffs' ability to maintain their claims on the ground that Plaintiffs failed to provide adequate notice of their intent to sue and that Plaintiffs have not satisfied their burden to demonstrate that they have standing to sue as constitutionally required. Furthermore, Defendant challenges Plaintiffs' substantive claims under the CWA and RCRA. Plaintiffs, in their motion, contend that they are entitled to summary judgment on their claim that Defendant violated the CWA's requirements of permits with respect to discharge of pollutants from point sources into navigable waters of the United States.

Oral argument on Plaintiffs' motion and Defendant's cross motion was heard on May 23, 1995. Subsequent to oral argument, the Court requested submission of Amicus Briefs by the Environmental Protection Agency ("EPA") and the New York State Department of Environmental Conservation ("DEC") to address the claims made by both parties regarding liability. The EPA and DEC submitted briefs on September 25, 1995. The parties thereafter responded to those briefs.

Discussion

Summary judgment is appropriate "if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment cannot issue if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The initial burden rests on the moving party to demonstrate that there exists no genuine issue of material fact and that it is entitled to judgment as a matter of law. See, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The moving party may satisfy its burden by showing the absence of evidence which would support the claims made by the non-moving party. See, Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The Court must view the facts in the light most favorable to the non-moving party. See, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). If, however, the evidence presented by the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, 477 U.S. at 249-250 (internal citations omitted).

Defendant's cross motion for summary judgment will be addressed first because Defendant's motion challenges Plaintiffs' ability to maintain their action in its entirety.

I. Defendant's Motion for Summary Judgment

Defendant contends that dismissal of Plaintiffs' Complaint is appropriate based upon [1] Plaintiffs' failure to

provide adequate notice of their intent to sue as required by RCRA and the CWA; [2] lack of individual and organizational standing; [3] Plaintiffs' inability to bring a citizen suit under RCRA; [4] the inadequacy of Plaintiffs' claims alleging that Defendant's operation of its trap shooting range results in disposal of solid waste and open dumping in violation of RCRA; [5] the inadequacy of Plaintiffs' claim that Defendant is required to obtain a dredge and fill permit under the CWA; and [6] the insufficiency of Plaintiffs' claim that an NPDES permit is required under the CWA.

A. Failure to Provide Adequate Notice

Defendant contends that the claims brought by Plaintiff Soundkeeper should be dismissed because Soundkeeper failed to provide notice as required by RCRA, the CWA and regulations promulgated thereunder and because the notice provided by Plaintiff Fishermen did not state alleged CWA violations with the specificity required by that statute.

Defendant contends that Plaintiff Soundkeeper should be precluded from proceeding as a party to this litigation because it failed to provide at least sixty or ninety days notice of intent to sue as required by the CWA and RCRA. 33 U.S.C. §1365(b)(1)(A); 42 U.S.C. §6972(b)(1),(2). In order to bring suit under RCRA or the CWA, a plaintiff must comply with the notice provisions of the relevant statute. See, Hallstrom v. Tillamook County, 493 U.S. 20, 26 (1989). Defendant concedes that Plaintiff Fishermen sent a

timely letter by which it provided timely notice of its intent to sue, but contends that Notice provided by a single plaintiff does not serve as notice from all plaintiffs. Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment ("Pl. Mem.") Ex. 1. Notice provided by a single plaintiff in a suit brought by multiple plaintiffs constitutes "substantial compliance" with the notice requirements of the CWA and RCRA. Cf. Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1193-94 (D.N.J. 1985). Accordingly, Defendant's argument that Plaintiff Soundkeeper should be dismissed for failing to send its own notice of intent to sue fails.

In addition to attacking Plaintiff Soundkeeper's failure to provide separate notice of its intent to sue, Defendant contends that the notice provided by Plaintiffs is not sufficiently specific with respect to Defendant's alleged violation of the CWA's NPDES permit requirements.[1] Defendant refers to the EPA's regulation promulgated under the CWA, which requires that:

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, and the full name,

[1] Defendant does not argue that the text of Plaintiffs' notice applicable to Plaintiffs' claims under RCRA lacked specificity required by that statute.

> address, and telephone number of the person giving notice.

40 C.F.R. §135.3(a). Fishermen's letter of intent to sue stated that:

> The New York Coastal Fishermen's Association will bring this suit under 42 U.S.C. §6972(a)(1)(A) (authorizing a suit against any person who violates any permit, standard, regulation, effective pursuant to RCRA), 42 U.S.C. §6972(a)(1)(B) (authorizing suit against any person who has contributed or is contributing to the disposal of any solid or hazardous waste which may present imminent and substantial endangerment to health or the environment), and 33 U.S.C. §1365(a)(1)(A) (authorizing a suit against any person who is "alleged to be in violation of an effluent standard or limitation" under the CWA.)

Pl. Mem., Ex. 1 at 1. The letter provided additional details regarding the nature of Plaintiff's claims under both RCRA and the CWA. Defendant claims that Fishermen's June 25, 1993 letter is deficient as a notice of intent to sue under CWA's permit requirements because it fails "to identify the specific standard, limitation or order alleged to have been violated." 40 C.F.R. §135.3(a). The regulation cited by Defendant does not specifically state the level of detail required in a notice of intent to sue, but only requires that Plaintiffs provide "sufficient information to permit the recipient to identify" the standard, limitation or order allegedly violated. In their letter, Plaintiffs state that:

> The skeet and trap shooting platforms at the New York Athletic Club on Travers Island which discharge lead shot into the waters of the Lower Harbor are "point sources" within the meaning of Section 502(14) of the CWA, 33 U.S.C. §1362(14). The discharge of lead and targets into the Lower Harbor violates Section 301(a) of CWA, 33 U.S.C. §1311(a).

This is adequate notice to Defendant of Plaintiffs' allegation that Defendant's trap shooting range is a point source and that it is committing continuing violations of the CWA's effluent limitations. Plaintiffs have provided adequate notice to Defendant of their intent to sue because Defendant has been exceeding and continues to exceed the effluent limitations contained in the CWA, and because Defendant has not obtained an NPDES permit to exceed the zero limitation on effluents contained in the CWA. Accordingly, Defendant's motion for summary judgment based on inadequate notice of intent to sue as required by the CWA is denied.

B. Standing

Defendant contends that dismissal of Plaintiffs' Complaint is appropriate because Plaintiffs lack standing to assert their claims. In order to invoke the jurisdiction of a federal court, a plaintiff must establish standing to sue. The doctrine of standing, based upon the "case or controversy" requirement of Article III of the Constitution, obligates a plaintiff to allege injury in fact, which must be actual or imminent and not conjectural. Whitmore v. Arkansas, 495 U.S. 149 (1990). Furthermore, the alleged injury must be fairly traceable to the actions of the defendant and likely to be redressed by a favorable decision. See, Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38-43 (1976). The party seeking to invoke federal jurisdiction

bears the burden of establishing the above mentioned elements. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2136 (1992). The Supreme Court has pointed out that "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the manner and degree of evidence required at the successive stages of the litigation." Lujan, 112 S.Ct. at 2136. Defendant has made a motion for summary judgment on the issue of Plaintiffs' standing to sue. Accordingly, it is necessary to determine whether Plaintiffs have provided facts sufficient to carry their burden of proof of standing at this point in the litigation.

Plaintiffs have submitted affidavits of several members of both Plaintiff organizations, attesting to the alleged injuries they have suffered and will continue to suffer as a result of Defendant's operation of its trap shooting range at Travers Island. Wilma Turnbull, President of the Coastal Fishermen's Association, has averred:

> I live on Eastchester Bay a few miles from the area of the Defendant, New York Athletic Club of the City of New York's (NYAC) Gun Club site, and I regularly frequent the Lower New Rochelle Harbor for personal recreational purposes. I generally visit Glen Island Park and Pelham Bay Park four to five times a year for hiking, bird watching, and walking along the shoreline. My enjoyment of the area has been diminished, however, by the view of the debris of targets and shot gun shell wadding in these parks. I have seen this debris along the Glen Island Park wall that faces NYAC. The sight of this garbage is offensive to me. I also regularly hike along the Siwanoy Trail, located on Pelham Bay Park and am offended by the shooting debris deposited by the flood tides of previous storms.

Affidavit of Wilma Turnbull, sworn to on October 7, 1994 ("Turnbull Aff.") at ¶4. Turnbull proceeded to aver:

> I plan to continue regular visits to these areas as part of my normal recreational activities in the foreseeable future. I have made definite plans to hike the Siwanoy Trail in Pelham Bay Park later this fall."

Turnbull Aff. at ¶5.

Jorge Santiago, a member of the Coastal Fishermen's Association, averred:

> Twice a month I go hiking and birdwatching on the Hunter's Island area of Pelham Bay Park for personal recreation. When I walk along the beach, I clean up debris that I find there. On this shore trail I have found shell casings from New York Athletic Club washed up by tidal floods. In the same area I have seen waterfowl feeding. I am offended by the shooting debris that I see on this trail. I am concerned that marine life and water fowl are seriously harmed by the pollution from the shooting debris and the poisonous effects of lead.

Affidavit of Jorge Santiago, sworn to on October 11, 1994 ("Santiago Aff.") at ¶4.

In his affidavit, Winthrop T. Parker, an active member of Plaintiff Soundkeeper, states:

> I live a few miles from NYAC's Gun Club site, and regularly come to the area for my personal recreation. Two to three times a month in the late fall and early spring I walk along the trails of Hunter's Island and Twin Island on Pelham Bay Park and along the shore of Glen Island Park. I am very upset by the shooting of lead shot into the water by NYAC's Gun Club at this time of year, and the sight of shell casings, and wadding along the shore at low tide.

Affidavit of Winthrop T. Parker, sworn to on October 11, 1994

("Parker Aff.") at ¶5. Parker proceeded to explain that:

> [a]lthough I am the descendant of two generations of fishermen, I do not fish any longer. My grandfather and father who lived on Pelham Bay, used to fish from a rowboat, anchored in front of the NYAC, at a safe distance from the shooting. The discharged lead pellets would fall into the water near them, and often into their boat so that at the end of the day, the bottom of the boat would be covered in spent lead shot. I know that lead is very toxic. I would fish again if the water were clean, and not polluted by lead shot.

Parker Aff. at ¶6.

In support of their motion for summary judgment on the basis of Plaintiffs' lack of standing, Defendant argues that the injuries alleged by Plaintiffs' affiants are "mere conjecture." Defendant contends that conjectural claims regarding the adverse effects of Defendant's continued operation of the trap shooting range on marine and bird life in its vicinity can be equated with hypothetical claims found insufficient to give rise to standing in Lujan v. National Wildlife Federation, 110 S.Ct. 3177, 3187-89 (1990) and Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2137-40 (1992). Plaintiffs' factual assertions respecting standing are not, however, limited to conjectural concerns regarding the future impact of the Gun Club's activities on the lower harbor. The above-cited portions of Plaintiffs' affidavits set forth allegations of actual aesthetic injury to individual members of both Plaintiff groups. Contrary to Defendant's assertions, the affidavits submitted by Plaintiffs do identify members of each group who regularly use the lower harbor for recreational purposes,

who intend to continue to use it, and who attest to aesthetic injury caused by activities conducted by Defendant. (Turnbull Aff. ¶4,5; Santiago Aff. ¶4, Parker Aff. ¶5.) The injury alleged--aesthetic harm and concerns regarding the impact of Defendant's activities on the intertidal zone and surrounding area--is injury that could be remedied, if the remediation and injunctive relief sought by Plaintiffs is granted. Cf. Simon, 426 U.S. 26.

For the first time in reply papers responding to Amicus Briefs submitted by the State of New York and the United States, Defendant argues that Plaintiffs have failed to demonstrate that their claims fall within the "zone of interests" protected by RCRA. The "zone of interests" test is one of several judicially imposed, but not constitutionally mandated "prudential limitations on a litigant's standing to bring a claim." Defenders of Wildlife, Friends of Animals And Their Environment v. Hodel, 851 F.2d 1035, 1039 (8th Cir. 1988). Congress may abrogate these limitations by legislatively extending standing under a particular statute to the limits allowed by the Constitution. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979).

The standing provision of RCRA reads, in relevant part...

> [A]ny person may commence a civil action on his own behalf--
>
> (1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order

> which has become effective pursuant to this chapter.

42 U.S.C. §6972(a)(1)(A). The broad provision extends standing under the statute to the limits allowed by the Constitution. Plaintiffs Soundkeeper and Fishermen are both "persons" within the meaning of RCRA's standing provision.[2] Cf. Defenders of Wildlife, 851 F.2d at 1039. Like the plaintiffs in Defenders of Wildlife, Plaintiffs here "need meet only the constitutional requirements for standing" for their RCRA claims. Defenders of Wildlife, 851 F.2d at 1039. Plaintiffs have satisfied their burden to demonstrate constitutional standing requirements by alleging statutory and regulatory violations of RCRA and the CWA by Defendant. For the above stated reasons, Defendant's motion for summary judgment based on Plaintiffs' lack of standing to sue under the CWA and RCRA is denied.

C. Plaintiffs' Claims under RCRA

Defendant also claims that it is entitled to summary judgment on three of Plaintiffs' RCRA claims, namely, the

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[2] RCRA defines "person" as:

> an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

42 U.S.C. §6903(15).

allegations that: [1] it has been operating without a permit a facility for the treatment, storage or disposal of solid or hazardous wastes in violation of 42 U.S.C. §6925; [2] it has failed to comply with operating requirements for disposal by permit of hazardous waste in violation of 42 U.S.C. §6924; and [3] it has, as a "facility" within the meaning of RCRA, caused a discharge of waste material which constitutes open dumping prohibited by RCRA.[3] Defendant's first and second contentions, relating to the alleged violation of permit requirements under RCRA, are addressed together; Defendant's argument that Plaintiffs' claims of open dumping of solid waste must be dismissed will be addressed separately.

1. Operation of Unpermitted Facility

Defendant argues that the Plaintiffs may not pursue in this Court their claims based on violation of an unpermitted facility because the RCRA permit procedures have been superseded by New York's EPA authorized program. The Complaint charges that Defendant has caused the discharge of hazardous waste--lead shot, lead fragments, lead residue, targets and target fragments--as defined in the statute and its regulations without a permit as required by RCRA and numerous violations of federal standards

[3] Defendant does not at this time move for summary judgment on Plaintiffs' claim that operation of the Range results in the disposal of waste "which may present an imminent and substantial endangerment to human health and the environment" brought pursuant to 42 U.S.C. §6972(a)(1)(B).

applicable to operators of hazardous waste disposal facilities. Compl. ¶¶95-103, 109. In addition to citing federal regulations, the Complaint cites provisions of New York State's regulatory program that coincide with the federal regulatory provisions allegedly violated by Defendant.

The EPA is responsible for administering RCRA. Under the statutory scheme, states may apply for and receive authorization to administer their own programs regulating disposal of hazardous waste. 42 U.S.C. §6926. In 1986, New York State received final authorization under §3006 of RCRA, 42 U.S.C. §6926, to administer and enforce its own hazardous waste program. See, 57 Fed. Reg. 9978 (Mar. 23, 1992). Defendant argues that New York State's EPA authorized program regulating hazardous waste disposal supersedes RCRA's federal permit and notification requirements. In support of its argument, Defendant cites Orange Environment, Inc. v. County of Orange, 860 F. Supp. 1003, 1020-21 (S.D.N.Y. 1994), in which the court was not forced to decide whether the existence of an EPA authorized hazardous waste program in New York precludes a citizen suit under §§3004 and 3005(a) of RCRA, 42 U.S.C. §§6924 and 6925, because the Plaintiffs had conceded defeat on the issue. See, Orange Environment, 860 F. Supp. at 1021. The Second Circuit decision cited by Defendant and by the court in Orange Environment, for the proposition that citizen suits under RCRA may be unavailable where independent state hazardous waste programs supersede the federal regulatory program enacted under RCRA, is

Dague v. City of Burlington, 935 F.2d 1343 (2d Cir. 1991), rev'd in part, 112 S.Ct. 964 (1992). Dague, however, did not confirm, as thought by Judge Goettel, the Vermont District Court's determination that a citizen suit under RCRA's statutory and federal regulatory provisions is not available where an authorized state hazardous waste program exists since that determination was not the subject of the appeal. Thus, the question of whether a citizen suit may be maintained, pursuant to 42 U.S.C. §6972(a)(1)(A), in New York State for violations of §§3004 and 3005(a) of RCRA despite the existence of an EPA authorized state hazardous waste management program, has not been answered by the Second Circuit.

Several courts in other circuits that have addressed the question, however, have determined that the citizen suit provisions of RCRA remain available in states that have EPA authorized hazardous waste maintenance programs that supersede EPA's regulations. See, e.g., Murray v. Bath Iron Works Corp., 867 F. Supp. 33 (D. Me. 1994)("According to the two courts that have squarely addressed the issue, a citizen suit under section 6972(a)(1)(A) is still available for violations of a state authorized program, since the state program, in having received EPA authorization under RCRA, 'has become effective' pursuant to RCRA, as required by section 6972(a)(1)(A)." Id. at 43.); Lutz v. Chromatex, Inc., 725 F. Supp. 258, 261 (M.D.Pa. 1989); but see Thompson v. Thomas, 680 F. Supp. 1, 3 (D.D.C. 1987); City of Heath,

Ohio v. Ashland Oil, Inc., 834 F. Supp. 971, 978 (S.D. Ohio 1993). The Lutz court relied on commentary by the EPA concerning authorization of Texas' hazardous waste management plan stating the Agency's position that citizen suits remain available in states that have EPA authorized hazardous waste programs:

> EPA believes that RCRA, the Federal regulations and the Texas application provide for a number of important avenues for public participation in hazardous waste management. Consequently, EPA finds that the Texas program, with its new program commitments, satisfies the Federal requirements in this area.
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> Under RCRA, Section 7002, any person may commence a civil action on his own behalf against any government instrumentality or any person who is alleged to be in violation of permits, regulations, conditions, etc.....As a result, any person, *whether in an authorized or unauthorized State,* may sue to enforce compliance with statutory and regulatory standards.

Lutz, 725 F. Supp. at 261 (quoting 45 Fed.Reg. 85016)(Dec. 24. 1980)(emphasis added)). Plaintiffs' claims based on alleged violations of §§3004 and 3005(a) of RCRA, 42 U.S.C. 6924, 6925 and the state's program cannot be dismissed for lack of a federal question based on the existence of an EPA authorized state hazardous waste program in New York.

Defendant also moves for dismissal of Plaintiffs' claim, under 42 U.S.C. §6972(a)(1)(A), that Defendant has been operating an unpermitted facility for the treatment, storage, or disposal of hazardous waste in violation of 42 U.S.C. §§6924 and 6925. Defendant contends that it is entitled to summary judgment on these claims because [1] the activities at the Range do not result in the

"disposal" of shot or targets; and [2] the shot and target fragments are not solid waste within the meaning of RCRA's regulatory framework.[4]

In its Amicus brief submitted in this matter, the EPA urges the Court to conclude that shot and target fragments do not constitute "solid waste" within the meaning of the regulations promulgated under RCRA. The regulations provide:

> **Definition of solid waste**
> (a)(1) A *solid waste* is any discarded material that is not excluded by §261.4(a) or that is not excluded by variance granted under §§260.30 and 260.31
> (2) A *discarded material* is any material which is:
> (i) *Abandoned...*
> (b) Materials are solid waste if they are *abandoned* by being:
> (1) Disposed of; or
> (2) Burned or incinerated; or
> (3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

40 C.F.R. §261.2. Spent rounds of ammunition and target fragments are not, the EPA asserts, "discarded material" within the meaning of the regulation, because they have not been "abandoned" as that term is defined in the above cited regulation. Because the shot and target fragments come to rest on land and in water surrounding NYAC as a result of their proper and expected use, the EPA contends that its permitting requirements are not applicable. While the Second Circuit has not resolved the issue of whether a

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[4] Hazardous wastes are a subset of solid wastes in the EPA's regulations.

trap shooting range constitutes a facility for the disposal of hazardous waste within the meaning of RCRA, it has discussed the fact that the regulatory definition of "solid waste" is narrower than the statutory definition. See, Connecticut Coastal Fishermen's Ass'n. v. Remington Arms, 989 F.2d 1305, 1314 (2d Cir. 1993). The EPA's interpretation of its own regulations is reasonable. As such, it is entitled to deference from this Court. See, Beazer East, Inc. v. United States E.P.A. Region III, 963 F.2d 603, 606-07 (3rd Cir. 1992); Cf. Chevron U.S.A. Inc. v. National Resources Defense Council, 467 U.S. 837 (1984). Spent shot and target fragments do not, therefore, fall within the regulatory definition of "solid waste" under RCRA. Accordingly, Defendant's motion for summary judgment dismissing Plaintiffs' first and second claims for relief under RCRA is granted.

2. Open Dumping in Violation of Section 4005(a) of RCRA, (42 U.S.C. §6945(a))

Defendant also moves for summary judgment with respect to Plaintiffs' claim that the operation of the shooting range constitutes "open dumping" prohibited by section 4005(a) of RCRA (42 U.S.C. §6945) and regulations promulgated thereunder.

Defendant contends that Plaintiffs' claims based on the EPA's regulations regarding solid waste disposal in surface water fail as a matter of law because private citizens cannot sue under RCRA's citizen suit provision for violations of the regulations promulgated at 40 C.F.R. §257.3-3. Neither side cites controlling

authority addressing the availability of citizen suits under the EPA's surface water regulations.

Defendant's motion raises a question of statutory construction that requires consideration of several provisions of RCRA and the EPA's regulations promulgated thereunder. The section Plaintiffs rely upon, 4005(a) of RCRA (42 U.S.C. §6945), provides:

> Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping.[5]

42 U.S.C. §6945(a). Congress thus did not in section 4005(a) of RCRA (42 U.S.C. §6945(a)) define what specific practices constitute prohibited open dumping practices. The statutory prohibition in section 4005(a) of RCRA (42 U.S.C. §6945(a)) references criteria to be promulgated by the EPA under section 1008(a) of RCRA (42 U.S.C. §6907(a)(3)). Through section 4005(a) of RCRA (42 U.S.C. §6945(a)), Congress explicitly delegated authority to the EPA to develop criteria for determining what will constitute open dumping practices prohibited by RCRA. The statute expressly states that

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[5] RCRA's citizen suit provision enables individuals to bring suit "against any person...who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter." 42 U.S.C. §6972(a).

upon promulgation of criteria under section 1008(a) of RCRA (42 U.S.C. §6907(a)(3)) defining "open dumping" under section 4005(a) (42 U.S.C. §6945(a)), violations of the statutory "open dumping" provision will be enforceable under the statute's citizen suit provision, section 7002 of RCRA (42 U.S.C. §6972).

Section 1008(a) (42 U.S.C. §6907(a)), referenced in section 4005(a) (42 U.S.C. §6945(a)), is entitled "Solid waste management information and guidelines" and states:

> Within one year of October 21, 1976, and from time to time thereafter, the Administrator shall, in cooperation with appropriate Federal, State, municipal, and intermunicipal agencies, and in consultation with other interested persons, and after public hearings, develop and publish suggested guidelines for solid waste management. Such guidelines shall--
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> * * *
>
> (3) provide minimum criteria to be used by the States to define those solid waste management practices which constitute the open dumping of solid waste or hazardous waste and are to be prohibited under subchapter IV of this chapter.

42 U.S.C. §6907(a). Thus the statutory prohibition in section 4005(a) of RCRA (42 U.S.C. §6945(a)) of open dumping is limited to criteria promulgated under section 1008(a) of RCRA (42 U.S.C. §6907(a)), nowhere does it include any criteria developed by the EPA under section 4004(a) of RCRA (42 U.S.C. §6944(a)), entitled "Criteria for sanitary landfills; landfills required for all disposal."[6]

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[6] Section 4004(a) of RCRA (42 U.S.C. 6944(a)) states:

> Not later than one year after October 21, 1976, after

Following the above described statutory framework in its regulations developed to define open dumping practices, the EPA was careful to distinguish between criteria promulgated for purposes of section 1008(a)(3) of RCRA (42 U.S.C. §6907(a)) and criteria promulgated for purposes of section 4004(a)of RCRA (42 U.S.C. §6944(a)) as follows:

> (1) Facilities failing to satisfy criteria adopted for purposes of section 4004(a) will be considered open dumping for purposes of State solid waste management planning under the Act.
> (2) Practices failing to satisfy criteria adopted for purposes of section 1008(a)(3) constitute open dumping which is prohibited under section 4005 of the Act.

40 C.F.R. §257.1(a)(46 Fed. Reg. 47048, 47052 (Sept. 23, 1981)). The criteria upon which Plaintiffs base their claim state:

> (a) For purposes of section 4004(a)of the Act, a facility

> consultation with the States, and after notice and public hearings, the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this chapter. At a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility. Such regulations may provide for the classification of the types of sanitary landfills.

42 U.S.C. §6944(a).

> shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Clean Water Act, as amended.
>
> [And]
>
> (b) For purposes of section 4004(a) of the Act, a facility shall not cause a discharge of dredged or fill material to waters of the United States that is in violation of the requirements under section 404 of the Clean Water Act, as amended.

40 C.F.R. §257.3-3(a),(b) (46 Fed. Reg. 47048, 47052 (Sept. 23, 1981)). The EPA's commentary addressing these criteria explained that:

> [t]oday's amendments...modify the surface-water criterion of §257.3-3. As originally promulgated, that standard would have made discharges violating requirements under Section 402 or Section 404 of the Clean Water Act open dumping practices as well. A party causing such a violation could simultaneously be subject to penalties under the CWA and a citizen suit to enjoin "open dumping" under RCRA. Today's amendment eliminates this double liability. However, since the open dump inventory classification for purposes of the State planning program does not impose legal sanctions under RCRA, the Criteria retain the provision that a violation of Section 402 or Section 404 makes a facility an open dump...EPA believes that the CWA enforcement mechanisms are sufficient to handle violations under Sections 402 and 404.

46 Fed. Reg. 47048, 47050 (Sept. 23, 1981).[7] The language of the

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[7] The original criteria referred to in the commentary read:

> (a) A facility or practice shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under Section 402 of the Clean Water Act, as amended.
> (b) A facility or practice shall

regulations and the accompanying EPA commentary make it clear that the EPA did not intend for the surface water criteria promulgated under section 4004(a) of RCRA (42 U.S.C. 6944(a)) to authorize citizen suits for open dumping practices in violation of section 4005(a) of RCRA (42 U.S.C. §6945(a)). This conflicts with Plaintiffs' contention that it can bring suit for violation of section 4005(a) of RCRA (42 U.S.C. §6945(a)) alleging violations of surface water criteria promulgated for purposes of section 4004(a) of RCRA (42 U.S.C. §6944(a)). Because Congress explicitly delegated to the EPA the authority to develop criteria concerning actionable open dumping practices, the EPA's construction of RCRA's prohibition of open dumping must be given controlling weight unless it is "arbitrary, capricious, or contrary to the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). The EPA's construction takes account of the provision of RCRA which states that "[t]he Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of...the Federal Water Pollution Control Act [33 U.S.C. §1251 et

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> not cause a discharge of dredged or material or fill material to waters of the United States that is in violation of the requirements under Section 404 of the Clean Water Act, as amended.

44 Fed. Reg. 53460, 53461 (September 13, 1979).

seq.]." 42 U.S.C. §6905(b)(1). The interpretation contemplates the availability of relief under CWA and determines it to be adequate. The interpretation is not arbitrary, capricious, or clearly contrary to the statute. Accordingly, the EPA's regulations and its own interpretation thereof are entitled to deference. See, Chevr on U.S.C. Inc., 467 U.S. at 844; see also, Beazer East, Inc., 963 F.2d at 606-07. Defendant's motion for summary judgment with respect to Plaintiffs' open dumping claims under RCRA is granted. But see, Orange Environment, Inc. v. County of Orange, 860 F. Supp. 1003 (S.D.N.Y. 1994) (denying summary judgment against open dumping claim brought by environmental group to force county landfill to comply with 40 C.F.R. Pt. 257); Gache v. Town of Harrison, N.Y., 813 F. Supp. 1037 (S.D.N.Y. 1993) (denying summary judgment against 42 U.S.C. §6945(a) claim brought by landowner for discharge of landfill leachate into water); Dague v. City of Burlington, 732 F. Supp. 458, 467 (D. Vt. 1989).

Defendant also seeks summary judgment dismissing Plaintiffs' contention that Defendant is subject to 40 C.F.R. §257.3-1, which states that:

> Facilities or practices in floodplains shall not restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.

This regulation appears irrelevant since the Defendant's operations are not alleged to be on a floodplain. Accordingly, Defendant's motion for summary judgment with regard to Plaintiffs' claim that

operation of the Range results in violations of 40 C.F.R. §257.3-1 is granted.

D. Plaintiffs' Claims Under the Clean Water Act

Defendant also contends that it is entitled to summary judgment on both of Plaintiffs' claims brought under the CWA. First, Defendant contends that it is entitled to summary judgment on Plaintiffs' claim that it violated the CWA by failing to obtain an NPDES permit because operation of the Range does not result in discharges of pollutants from a point source.[8] Second, Defendant argues that Plaintiffs' contention that its operation of the Range results in discharge of dredge and fill material without a permit as required by the CWA, should be dismissed because the materials deposited in Long Island Sound as a result of the operation of the Range do not fall within the regulatory definition of "dredge" or "fill" material.

Regulations promulgated by the Army Corps of Engineers define "dredged materials" as "material that is excavated or dredged from waters of the United States" 33 C.F.R. §323.2(c) and "fill material" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody." 33 C.F.R. §323.2(e). Defendant

[8] Defendant's argument that summary judgment is appropriate on Plaintiffs' claims that it failed to obtain an NPDES permit in violation of the CWA is addressed below, with Plaintiffs' claim that they are entitled to summary judgment on the same claim.

contends that the Army Corps of Engineers' regulations promulgated under the CWA deserve deference and that because the operation of the Range does not result in removal of anything from the waters of Long Island Sound and because the purpose of the activity carried out at the Range is recreational and not oriented towards changing the bottom elevation, Plaintiffs' claim that Defendant was required to obtain a permit pursuant to 33 U.S.C. §1344 fails. Plaintiffs did not in their papers or at oral argument attempt to support the position that operation of the Range generates "dredge" or "fill" material within the meaning of the CWA. Activities conducted at the Range are not oriented towards changing the bottom elevation, nor do they result in removal of anything from navigable waters of the United States. Defendant's motion to dismiss Plaintiffs' claim that Defendant has failed to obtain a permit for a dredge and fill operation in violation of the CWA is granted.

II. Plaintiffs' Motion for Summary Judgment on Their CWA Claim

Plaintiffs contend that they are entitled to summary judgment on their claim that Defendant has violated and continues to violate the CWA.[9] Under the statute, "discharge of a pollutant"

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[9] Section 505(a) of the CWA reads:

> **(a) Authorization; jurisdiction**
> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf--
> (1) against any person...who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or

is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). Citizen suits may be brought under Section 505(a) of the CWA if [1] plaintiffs provide 60 days notice, 33 U.S.C. §1365(b)(1)(A), [2] the suit is not preempted by state or federal enforcement action prior to the filing of the complaint, 33 U.S.C. §1365(b)(1)(B); and [3] the Plaintiff in good faith alleges a continuing violation in its complaint. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). A violation of the effluent limitations of the Act is demonstrated where a person discharges a pollutant into navigable waters from a point source without a permit as required by the Act. United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 948 (W.D. Tenn. 1976).

Defendant concedes that it is a person within the meaning of the CWA. Def. 3(g) ¶3. Likewise, Defendant concedes that the waters of Long Island Sound into which debris from its trap shooting range fall are "navigable waters" within the meaning of the CWA. Def. 3(g) ¶6. The questions which remain to be resolved are [1] whether the trap shooting range (or any part of it) constitutes a point source within the meaning of the CWA; and [2] whether target debris and spent shot are pollutants within the meaning of the CWA.

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limitation.

33 U.S.C. §1365(a)(1).

The CWA defines "point source" as

> any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. §1362(14). Defendant contends that neither the Range nor any aspect of it constitutes a point source within the meaning of the CWA. In support of its argument, Defendant cites United States v. Plaza Health Laboratories, Inc., 3 F.3d 643 (2d Cir. 1993), cert. denied, 114 S.Ct. 2764 (1994), where the court determined that an individual is not a point source within the meaning of the Act. Plaintiffs in this action, however, do not contend that individuals shooting at clay targets are point sources within the meaning of the CWA, but that the Range itself, the mechanical target launchers, and the platforms upon which a rotation of individuals stand to shoot targets constitute point sources.

In its Amicus brief, the EPA--the agency to which Congress gave substantial discretion in administering the CWA--submits to the Court that "point sources" include "all discrete, identifiable sources from which pollutants are emitted or conveyed into United States waters." Amicus Brief of the United States of America at 6. The Second Circuit has acknowledged that:

> The definition of a point source is to be broadly interpreted: "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was

> designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States."

Dague v. City of Burlington, 935 F.2d 1343, 1354-55 (2d Cir. 1991)(quoting United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979). Other courts have recognized that a wide range of polluting activities are point sources within the meaning of the Act where human activity generates pollution and pollutants are conveyed into water by human effort. See, e.g., Concerned Area Residents For The Environment v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994), cert. denied, 115 S.Ct. 1795 (1995)(manure spreading vehicles and tankers that discharge on field from which manure flows into navigable waters are point sources within the meaning of the CWA); Committee To Save Mokelumne River v. East Bay Mun. Utility Dist., 13 F.3d 305, 308-09 (9th Cir. 1993) (spillway and valve of dam that channels acid mine runoff from abandoned mine site constitute point sources within meaning of CWA); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983)(bulldozers and backhoes constitute point sources within the meaning of the CWA); Sierra Club v. Abston Const. Co., Inc., 620 F.2d 41, 45 (sump pits into which contaminated runoff from strip mining operation which sometimes overflowed into navigable waters considered point sources within the meaning of the CWA); Romero-Barcelo v. Brown, 478 F. Supp. 646, (D.P.R. 1979), rev'd on other grounds, 643 F.2d 835 (1st Cir. 1981), aff'd sub nom., Weinberger

v. Romero-Barcelo, 456 U.S. 305 (1982)("It would be a strained construction of unambiguous language for the Court to interpret that the release or firing of ordnance from aircraft into the navigable waters of Vieques is not '...an addition of any pollutant...from any point source...", particularly in view of the broad rather than narrow interpretation given to this type of statute." Id. at 664).

The trap shooting range operated by Defendant, which is designed to concentrate shooting activity from a few specific points and systematically direct it in a single direction--over Long Island Sound--is an identifiable source from which spent shot and target fragments are conveyed into navigable waters of the United States. As such, the Range constitutes a point source within the meaning of the CWA. The remaining question is whether the spent shot and target fragments conveyed into United States waters constitute pollutants within the meaning of the CWA.

The CWA defines "pollutant" as:

> dredged spoil, solid waste, incinerator residue, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. §1362(6). Defendant argues that spent shot and target fragments which land in Long Island Sound as a result of the operation of the Range are not "pollutants" within the meaning of

the CWA. It argues that DEC has exercised its interpretive authority with respect to the Act to determine that trap shooting ranges fall outside of the Act's permitting requirements. In support of this argument, Defendant relies upon a series of communications between Stephen Vasaka, Chairman of the Trap Shooting Committee of NYAC and Herbert Doig, an employee of the New York State DEC. Mr. Vasaka wrote in a letter of March 3, 1994:

> [I] write this letter to seek confirmation by your office that the operation of this facility does not constitute the disposal of solid or hazardous waste under the Resource Conservation and Recovery Act (RCRA), any federal environmental law or regulation which your office overseas [sic] or implements, or any other applicable environmental law or regulations administered by your office. I further write to seek your confirmation that the DEC requires no permitting of this facility under any of the environmental laws it administers including RCRA and the Clean Water Act provisions regarding discharge of pollutants.

Supplemental Affidavit of Stephen A. Vasaka, Sworn to on May 19, 1995 ("Suppl. Vasaka Aff."), Ex. A at 1. Defendant submits a letter, dated May 15, 1995, written by Mr. Doig in response to Mr. Vasaka's inquiry of March, 1994:

> [T]his will advise that the Department does not regulate shooting activities on ranges and that current environmental laws do not require permits for discharge of lead or steel shot on shooting ranges.

Suppl. Vasaka Aff. Ex. B. The position taken by New York State in its Amicus Brief, as well as the position taken by the United States, contradicts Mr. Doig's representation and undermines Defendant's argument. The CWA's broad statutory definition of "pollutant" has been interpreted to apply to substances emitted

into United States waters, regardless of whether they have been put to beneficial use or to their intended use. See, Hudson River Fishermen's Ass'n. v. City of New York, 751 F. Supp. 1088, 1101 (S.D.N.Y. 1990), aff'd 940 F.2d 649 ("It is indisputable that a pollutant is a pollutant no matter how useful it may earlier have been." Id.)

The CWA, moreover, does not require any showing that a pollutant has caused environmental damage to enforce the NPDES permitting requirement. See, City of Milwaukee v. Illinois, 451 U.S. 304, 310 (1981); see also, Orange Environment, Inc. v. County of Orange, 811 F. Supp. 926, 934 (S.D.N.Y. 1993)("'the CWA's requirement that all discharges covered by the statute must have a NPDES permit "is unconditional and absolute. Any discharge except pursuant to a permit is illegal."'" Id.)(quoting United States v. Tom-Kat Development, Inc., 614 F. Supp. 613, 614 (D. Alaska 1985)(quoting Kitlutsisti v. Arco Alaska, Inc., 592 F. Supp. 832, 839 (D. Alaska 1984)). In Connecticut Coastal Fishermen's Association v. Remington Arms Co., 989 F.2d 1305, 1313 (2d Cir. 1993), the Second Circuit stated that spent ammunition fired from guns--be it composed of lead or steel--which lands in navigable waters constitutes a pollutant within the meaning of the CWA. Congress' purpose in enacting the CWA is broadly stated: "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. §1251(a). Given the statute's broad mandate, case law

interpreting the meaning of "pollutants" within the CWA, and the arguments of the EPA and DEC, shot and target debris generated by operation of Defendant's trap shooting range constitute pollutants within the meaning of the CWA. Accordingly, Plaintiffs' motion for partial summary judgment is hereby granted.

Plaintiffs are entitled to declaratory and injunctive relief available under the CWA and shall submit an order on notice within five days of the filing of this Opinion and Order enjoining Defendant from operating its trap shooting range unless and until it obtains an NPDES permit as required by the CWA.

Conclusion

For the above stated reasons, Defendant's motion for summary judgment is granted in part and denied in part, Plaintiffs' motion for partial summary judgment is granted.

IT IS SO ORDERED.

Dated: New York, New York
March 20, 1996

Robert P. Patterson, Jr.
U.S.D.J.